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No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 1993

COUNTY OF WESTCHESTER,
Petitioner

v.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,
Respondents

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS

Amicus, pursuant to Supreme Court Rule 36, writes to emphasize its concern for the proper interpretation and application of the substantive law of the State of Connecticut. It is well-established that the highest court of a State has the final word on the meaning of State law and that a Federal Court in a diversity case must follow the substantive law directed by the highest court of the State whose law is found to be applicable. This legal tenet is simply a reflection of the fundamental principles of federalism and comity that are the underpinning of our Nation's constitutional form of government. It is a legal tenet that is memorialized, *inter alia*, in the Rules of Decision Act, 28 U.S.C. §1652, and which was properly followed by the United States Court of Appeals for the Second Circuit in the instant matter.

STATEMENT OF THE CASE

This case turns on the construction of Connecticut's common law of easements by prescription. It came to the federal courts under their diversity jurisdiction.

The District Court, while conceding that the common law of easements by prescription was purely an issue of substantive Connecticut law and that the Connecticut Supreme Court had not as yet addressed the question of avigation easements, nevertheless found that the Connecticut Supreme Court, if called upon to decide the issue under the facts of this case, would recognize the petitioner's claim to an avigation easement by prescription. *County of Westchester v. Town of Greenwich*, 793 F. Supp. 1195, 1205 (S.D.N.Y. 1992). The District Court was wrong.

On appeal, the Court of Appeals for the Second Circuit certified the Connecticut real property law issue to the Supreme Court of Connecticut, pursuant to Conn. Gen. Stat. § 51-199a (Uniform Certification of Questions of Law Act). The Connecticut Supreme Court accepted the certification.

Based upon the facts presented by the Court of Appeals, as found by the District Court, the Connecticut Supreme Court held that since the owners of the land were precluded from instituting an action to bar any trespass by overflying aircraft, a critical element of the Connecticut common law of easement by prescription,

the Court could not agree with the District Court's conclusion that the petitioner had a claim to an avigation easement by prescription. *Westchester v. Greenwich*, 227 Conn. 495, 502, 629 A.2d 1084 (1993).

The Court of Appeals agreed with the Connecticut Supreme Court, reversed the judgment of the District Court on the issue of Connecticut state law and remanded the case to the District Court for further proceedings.

Dissatisfied, Westchester has now petitioned this Court for a determination of the Connecticut law of easements by prescription.

SUMMARY OF THE ARGUMENT

The Court should deny the petition for a writ of certiorari for the following reasons: (a) this case turns upon the construction of a limited issue of Connecticut's substantive law of real property and a determination by this Court of that issue will have no significant impact upon the established relationship of the State and the Federal Court systems in diversity cases; and (b) Westchester's petition to this Court contains a material misstatement of the substantive law of Connecticut.

ARGUMENT

A. THE COURT OF APPEALS PROPERLY APPLIED THE LAW OF THE STATE OF CONNECTICUT AS DETERMINED BY THE HIGHEST COURT OF THAT STATE.

The concepts of real property law are deeply rooted in the traditions, customs, habits and laws of the several States. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U.S. 204, 210 (1946).

The Rules of Decision Act [28 U.S.C. §1652] commands that except where Federal law expressly preempts the field, the Federal Courts are to regard the laws of the States as the rules of decision in all civil actions. *King v. Order of United Commercial Travelers*, 333 U.S. 153, 157 (1948). The laws of the states, as the term is used under this statute, is not limited to the state statutes, but includes the case precedents of the state as well. *Id.*, 157. In a diversity case, the substantive law of the state, as announced by the highest Court of that State, is binding upon the Federal Courts. *Id.*, 157-158.

The object of the statute is to provide for uniformity of decision, discourage forum shopping, and maintain comity between the State and the Federal court systems. *Id.*, 157-158. The outcome of the judicial determination of the substantive law of the state should not be determined by the chance of diverse citizenship nor should the parties be encouraged to shop between one court house and the other in search of the most

favorable reading of the substantive law of the state. *Id.*, 157-158.

In this case, the District Court decided the diversity case before it on the basis of what that Court thought the Connecticut Supreme Court would hold to be the substantive law of Connecticut, if presented with the question. On appeal, the Court of Appeals certified the question to the Connecticut Supreme Court. The Connecticut Supreme Court entertained the briefs and oral arguments of all of the parties. Thereafter, the Supreme Court responded to the certification by stating that under the facts found by the District Court, no easement by prescription could be created under Connecticut law. The petitioner has no right, as it would have it, to an expansive explication of Connecticut law so it may then argue it in Federal Court. Having provided the Federal Court with a determination of the substantive law of Connecticut sufficient to decide this case, the Connecticut Supreme Court in its discretion declined to elaborate further upon portions of the certification unnecessary to the resolution of the controversy. *Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co.*, 203 Conn. 667, 668 n.1, 526 A.2d 522 (1987). Nor did the Connecticut Supreme Court find facts, as the petitioner contends. Rather, accepting facts found by the District Court, the Supreme Court determined as a matter of Connecticut law that the petitioner had no prescriptive easement. That the petitioner is dissatisfied with the substance of the Supreme Court's opinion

does not make this case worthy of this Court's consideration.

The petitioner essentially asked the Court of Appeals to review the determinations of the Connecticut Supreme Court on the Connecticut substantive law issues determined by that court. The Court of Appeals' refusal to entertain a collateral attack upon the judgment of the Connecticut Supreme Court was consistent with the jurisdictional commands found within 28 U.S.C. §1738. *Migra v. Warren City School District Board of Education*, 465 U. S. 75, 81 (1984). (Federal Court may not entertain a collateral attack upon a final judgment of a State Court of competent jurisdiction in the absence of an affirmative showing of a lack of due process).

Both courts fully and fairly fulfilled their responsibilities under the Rules Decision Act. The comity between the two court systems and the need for uniformity of decision commanded in *King* have been satisfied in this case. There is no need or justification for review by this Court.

B. THE PETITIONER HAS MISSTATED THE SUBSTANTIVE LAW OF CONNECTICUT

The petitioner represents that but for the fact that it is an out of state party, the Connecticut Supreme Court would have recognized avigation and clearance

easements by prescription. (Petition at 40). The petitioner is mistaken.

Easements acquired by prescription must be fixed, ascertainable in location, scope and volume and fully apparent to the owner of the serviant estate. *Cartenovitz v. Conti*, 92 Conn. 546, 550, 103 A.2d 629 (1918) (the owner of the dominate estate acquired an easement by prescription over the serviant estate of his neighbor by extending the fire escape attached to an upper floor of his building over the servant tenant's land.) *Norwalk Heating & Lighting Co. v. Vernam*, 75 Conn. 662, 663-664, 55 A. 168 (1903) (the owner of the dominative estate acquired an easement by prescription by building an addition onto an upper floor of his building which extended over, but did not touch, the surface of the abutting property owner's land).

An easement by prescription may not be obtained under Connecticut law where the intended use is designed to injure the serviant estate in an unnatural or unreasonable manner. *Lawton v. Herrick*, 83 Conn. 417, 424, 76 A.2d 986 (1919). In *Lawton* the claimant to the easement used it to foul the pond on the serviant estate, thereby damaging the serviant tenant's mill operations. The Connecticut Supreme Court refused to recognize the easement. *Id.*, 424.

In this case, the boundaries, volume and limits of avigation and clearance easements claimed by Westchester were not readily apparent to a property owner standing on the ground. Likewise, lopping off

the tops of the trees on the Greenwich King Street tree farm would be ruinous to that respondent's business. Lowering the flight patterns of commercial aircraft would impair the resale value of Mildred Tomonto's home and impair the convalescent home's use of its land.

Thus, even if Federal law had allowed the property owners to enjoin trespassing overflights, the long standing precedents of the Connecticut Supreme Court would have prevented any Court applying the substantive law of Connecticut to recognize Westchester's purported easements by prescription.

In short, under principles of Connecticut State law established long before the petitioner instituted its lawsuit in the Federal District Court, the petitioner could not acquire an avigation easement by prescription.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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